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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1958.

No. 133

R. B. JAMES, and PATRICK ZURLA, individuals and Co-partners, trading as CHICAGO BOARD CO.,
Petitioners,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To The Honorable, The Chief Justice And The Associate Justices Of The Supreme Court Of The United States:

Your petitioners R. B. James and Patrick Zurla, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above entitled case on February 7, 1958, affirming an order issued by the Federal Trade Commission.

OPINION BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 253 Fed. (2) 78 (App. 2a).

JURISDICTION.

The judgment of the United States Court of Appeals for the Seventh Circuit was entered February 7, 1958 (App. 2a), petition for rehearing denied March 31, 1958 (App. 5a), and final order entered on the 7th day of April, 1958 (App. 5a).

The Jurisdiction of this Court is invoked under Section 5 (c) of the Federal Trade Commission Act, 66 Stat. 632; 15 U.S.C. Sec. 45 (a) (1952 ed), which provides, "The judgment and decree of the (Circuit) court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 240 of the Judicial Code" (App. 1a).

QUESTION PRESENTED FOR REVIEW.

The decision in this case is contrary to and in direct conflict with this Court's decision in the case of *Federal Trade Commission* v. *Bunte Bros.*, 312 U.S. 349.

STATUTE INVOLVED.

The statute which is involved is the Federal Trade Commission Act 66 Stat. 632; 15 U.S.C. Sec. 45 (a) (1952 ed).

STATEMENT OF THE CASE.

Petitioners sell punchboards and push cards in interstate commerce to other persons, firms and corporations. Some of petitioners' products are used to distribute merchandise. The only persons, firms or corporations who use punchboards as chance devices to distribute merchandise are persons, firms and corporations who are engaged exclusively in intrastate commerce.

The complaint does not allege that the intrastate use of punchboards to distribute merchandise is a violation of the F.T.C. Act nor is there an allegation that the shipping of punchboards which are used exclusively in intrastate commerce is a violation of the said statute.

The order of the Federal Trade Commission is as follows, to wit:

> It is ordered that the respondents do forthwith cease and desist from:
>
> Selling or distributing in commerce as commerce is defined in the Federal Trade Commission Act, punch boards, push cards, or other lottery devices, which are to be used, or may be used, in the sale or distribution of merchandise to the public by means of a game of chance, gift enterprise, or lottery scheme.

ARGUMENT ON REASONS FOR GRANTING THE WRIT.

Petitioners' point is that the decision in the case at bar by the United States Circuit Court of Appeals is contrary to and in direct conflict with this Court's holding in the case of *Federal Trade Commission* v. *Bunte Bros.*, 312 U.S. 349.

The Circuit Court in its opinion in the case at bar says:

> "*Federal Trade Commission* v. *Bunte Bros., Inc.*, 312 U.S. 349 (1941) and *U. S.* v. *Perry Halseth*, 342 U.S. 277 (1952) are the two chief, and inapposite, opinions forming the core of petitioners brief. We agree with views of Chief Judge Gardner reported in *Zitserman* v. *Federal Trade Commission*, 200 F. 2d 519, 523 (8th Cir. 1952)."

The *Zitserman* case is in direct conflict with the *Bunte* case, therefore, the case at bar is in conflict with the *Bunte* case.

This Court in the case of *Federal Trade Commission* v. *Bunte Bros., Inc.*, 312 U.S. 349, held that the intrastate use of punchboards, that is the use of chance, to distribute merchandise is not a violation of the Federal Trade Commission Act. While on the other hand, *in direct conflict with the holding in the Bunte case*, the case of *Zitserman* v. *Federal Trade Commission*, 200 F. 2d 519, held that the use of punchboards, that is the use of chance, to distribute merchandise is a violation of the Federal Trade Commission Act. The truth and accuracy of the above statement cannot be questioned. Just a casual reading of the two above cited cases will establish beyond doubt that the *Zitserman* case is in direct conflict with the *Bunte* case, as we said above, "therefore, the case at bar is in conflict with the *Bunte* case".

CONCLUSION.

Wherefore, Petitioners respectfully request that this Court grant their petition, require by certiorari that the cause be certified to It for review and determination, issue Its writ of certiorari to review the judgment of said Circuit Court of Appeals, hear, consider, and determine the questions presented and reverse the judgment, and order of said Court insofar as that judgment, and the holdings of the Court, are adverse to the petitioners' contentions.

Respectfully submitted,

THOMAS J. PEARSON
Attorney for Petitioners.

APPENDIX.

PERTINENT TEXT OF THE FEDERAL TRADE COMMISSION ACT, 66 Stat. 632; 15 U.S.C. Sec. 45 (a) (1952 ed.).

"Sec. 5 (a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938, and persons, partnerships, or corporations subject to the Packers and Stockyards Act, 1921, except as provided in section 406 (b) of said Act, from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce."

UNITED STATES COURT OF APPEALS
for the Seventh Circuit
Chicago 10, Illinois

Order entered Friday, February 7, 1958.

Before: J. EARL MAJOR, PHILIP J. FINNEGAN, and ELMER J. SCHNACKENBERG, *Circuit Judge*

(Title of Cause.)

This cause came to be heard on the petition for review of an order of the Federal Trade Commission and the transcript of the record from the Federal Trade Commission, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the cease and desist order of the Federal Trade Commission entered therein on June 12,

1957, be AFFIRMED and judgment entered by this Court enforcing it in accordance with the provisions of 15 U.S.C. § 45 (c), pursuant to the opinion of this Court filed this day.

OPINION.

In the

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

No. 12106. SEPTEMBER TERM, 1957 JANUARY SESSION, 1958.

R. B. JAMES, and PATRICK ZURLA, Individuals and Co-partners, Trading as CHICAGO BOARD COMPANY,

Petitioners,

v.

FEDERAL TRADE COMMISSION,

Respondent.

On Petition to Review and Set Aside An Order of the Federal Trade Commission.

February 7, 1958.

Before MAJOR, FINNEGAN and SCHNACKENBERG, *Circuit Judges.*

FINNEGAN, *Circuit Judge.* Section 5(a)(1) of the Federal Trade Commission Act in relevant part[1] provides: "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful." The co-partner petitioners have brought here for review a cease and desist order[2] issued against them by the Commission acting under § 5(a)(1) based upon undisputed facts showing the following. For

[1] 66 Stat. 632; 15 U. S. C. § 45(a) (1952 ed).

[2] Petitioners are restrained from "Selling or distributing in commerce, as 'commerce' is defined in the Federal Trade Commission Act, pushcards, punchboards, or other devices which are designed or intended to be and in the sale or distribution of merchandise to the public by means of a game of chance, gift enterprise or lottery scheme."

two years these petitioners engaged in the sale and distribution in commerce, within the statutory meaning of that word, of pushcards and punchboards, for use by retail dealers when selling merchandise to the public. These pushcards and punchboards are designed and arranged for use in games of chance, gift enterprises or lottery schemes by retailers when selling and distributing merchandise to the buying public. Petitioners' sales in 1954 and 1955 amounted to roughly $500,000 annually, and their pushcards and punchboards are transported from their Illinois place of business to purchasers in various parts of the United States and the District of Columbia. Other significant factual aspects of this situation are adequately summarized in the Commission's opinion:

> "Some of said pushcards and punchboards have printed on the faces thereof, legends or instructions which explain the manner in which said devices are to be used in the sale or distribution of various specified articles of merchandise. Others have blank spaces where the user may place his own legends or instructions. The prices of the sales on the pushcards and punchboards vary with the individual device. Upon payment of the amount specified, each purchaser is entitled to one punch or push from the punchboard or pushcard, and when a punch or push is made, a disc or printed slip is separated from the device and a number is disclosed. The number is effectively concealed from the purchaser or prospective purchaser until a selection has been made and the push or punch completed. Certain specified numbers entitle purchasers to designated articles of merchandise, and purchasers securing lucky or winning numbers receive articles of merchandise without additional cost at prices which are much less than the normal retail price of said articles of merchandise. Purchasers who do not secure such lucky or winning numbers receive nothing for their money other than the privilege of making a push or punch from said card or board. The articles of merchandise are thus distributed to the public wholly by lot or chance. Some of these devices may be, and sometimes have been, used to distribute cash prizes, but the primary and usual use is for the sales and distribution of merchandise.

"Many persons, firms and corporations who sell and distribute, and have sold and distributed, candy, cigarettes, clocks, razors, golf equipment, cosmetics, clothing, and other articles of merchandise in commerce between and among the various states of the United States and in the District of Columbia, purchase and have purchased respondents' pushcard and punchboard devices, and pack and assemble, and have packed and assembled, assortments consisting of various articles of merchandise together with said pushcard and punchboard devices, and have sold said assortments to retail dealers and others for resale to the public. Respondents thus supply to and place in the hands of retail dealers and others, through the channels of interstate commerce, the means of conducting lotteries or games of chance in the sale and distribution of merchandise to the general public."

Overlooking, when not denying, Congressionally authorized Commission functions and aims, these petitioners, in substance, claim an unrestricted right to use interstate commerce channels for flooding the states with punchboards. Because petitioners themselves do not participate in the ultimate sales of punches over store counters to individual consumers within a state, petitioners ask for immunization from § 5(a)(1). To describe their position posits the refutation of it. *Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U. S. 483 (1922).

The parties' stipulations entered of record during Commission hearings on the complaint sufficiently supports the findings made by the Agency. *Federal Trade Commission* v. *Bunte Brose, Inc.*, 312 U. S. 349 (1941) and *U. S.* v. *Perry Halseth*,[3] 342 U. S. 277 (1952) are the two chief, and inapposite, opinions forming the core of petitioners' brief. We agree with views of Chief Judge Gardner reported in *Zitserman* v. *Federal Trade Commission*, 200 F. 2d 519, 523 (8th Cir. 1952). See also the opinion of Chief

[3] An order entered by a panel of judges of our court September 5, 1954 affirmed the Commission's order in *Perry Halseth* v. *Federal Trade Commission*, No. 11022. There, petitioner's brief cited and heavily relied on *United States* v. *Halseth*, 342 U. S. 277 (1952). For some reason petitioners, in our court, persistently insist that the Supreme Court's decision under 18 U. S. C. § 1301 has bearing on a Federal Trade Commission proceeding. Obviously such reliance, by petitioners on review, is misplaced. See *e. g. Lichtenstein* v. *Federal Trade Commission*, 194 F. 2d 607, 611 (9th Cir. 1952).

Judge Phillips reported as *Gay Games* v. *Federal Trade Commission*, 204 F. 2d 197 (10th Cir. 1953) and *Feitler* v. *Federal Trade Commission*, 201 F. 2d 790 (9th Cir. 1953). The last three cited cases involve punchboards and the tenuous questions under review in this appeal. There will be no conflict between those three circuits and ours in this matter.

The cease and desist order of the Commission is affirmed and judgment entered by this court enforcing it in accordance with the provisions of 15 U. S. C. § 45(c).

UNITED STATES COURT OF APPEALS

for the Seventh Circuit

Chicago 10, Illinois

Order entered Monday, March 31, 1958

Before: J. EARL MAJOR, PHILIP J. FINNEGAN, and ELMER J. SCHNACKENBERG, *Circuit Judge*

(Title of Cause.)

It is ordered by this Court that the petition for a rehearing of this cause be, and the same is hereby, DENIED.

UNITED STATES COURT OF APPEALS

for the Seventh Circuit

R. B. JAMES, and PATRICK ZURLA, Individuals and Co-partners, Trading as CHICAGO BOARD COMPANY, *Petitioners,* v. FEDERAL TRADE COMMISSION, *Respondent.*	No. 12,106

FINAL DECREE COMMANDING OBEDIENCE TO ORDER TO CEASE AND DESIST

Petitioners herein, having filed in this Court on August 9, 1957, a petition to review and set aside an order issued

against them on June 12, 1957, by the Federal Trade Commission, respondent herein, in a proceeding before it entitled "In the Matter of R. B. James, and Patrick Zurla, Individuals and Co-partners, trading as Chicago Board Company, Docket No. 6482"; and a copy of said petition having been served upon respondent; and respondent thereafter having certified and filed herein, as required by the Federal Trade Commission Act, a transcript of the entire record in said proceeding; and the matter having been heard by this Court on briefs and oral argument on January 13, 1958; and this Court having thereafter fully considered the cause and having rendered its decision on February 7, 1958, affirming and entering its judgment enforcing said order:

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that the aforesaid petition be, and it hereby is, dismissed, and that petitioners be, and they hereby are, commanded to obey the aforesaid order to cease and desist, as heretofore affirmed and enforced, and to comply therewith; and

It Is Hereby Further Ordered, Adjudged and Decreed that within ninety days after the entry of this decree petitioners shall file with the Federal Trade Commission a report in writing, setting forth in detail the manner and form in which they have complied with said order to cease and desist.

Without prejudice to the right of the United States, as provided in Section 5(1) of the Federal Trade Commission Act, to prosecute suits to recover civil penalties for violation of the aforesaid order to cease and desist, heretofore affirmed and enforced, and without prejudice to the right of the Federal Trade Commission to institute and maintain contempt proceedings for violation of this decree, this Court retains jurisdiction of this cause

to enter such further orders herein from time to time as may become necessary effectively to enforce compliance in every respect with this decree and to prevent evasion thereof.

By the Court:

/s/ PHILIP J. FINNEGAN
U. S. Circuit Judge

/s/ ELMER J. SCHNACKENBERG
U. S. Circuit Judge

Dated: Apr 7 1958

A True Copy:

Teste:

Kenneth J. Carrick

Clerk of the United States Court of Appeals for the Seventh Circuit

(Seal)

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago 10, Illinois

CERTIFICATE OF THE CLERK

I, Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing ..... pages contain a true copy of Brief and Argument for the Petitioners and Appendix, Filed October 16, 1957, Opinion Filed February 7, 1958, Judgment, Entered February 7, 1958, Petition for Rehearing Denied March 31, 1958, and Final Decree, Entered April 7, 1958, in

Cause No. 12106

R. B. James & Patrick Zurla, etc., et al.,

vs.

Federal Trade Commission

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this Nineteenth day of June A. D. 1958.

Kenneth J. Carrick

Clerk of the United States Court of Appeals for the Seventh Circuit

(Seal)